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## A Reconsideration of the Sworn Testimony Requirement: Securing Truth in the Twentieth Century

*Oath: In law, a solemn appeal to the Deity, made binding upon the conscience by a penalty for perjury.*

Ambrose Biercè, *The Devil's Dictionary*

### I. INTRODUCTION

Upon observing the "swearing in" of a witness,<sup>1</sup> one might justifiably conclude that the procedure is a ritual without substance. Often administered with pro forma dispatch, the ancient institution of the judicial oath<sup>2</sup> may appear more a genuflection performed out of habit than a ceremony sacred or significant to the law.<sup>3</sup> Such perfunctoriness, at its extreme, is revealed in the occasional practice of swearing witnesses en masse in order to expedite trial.<sup>4</sup>

The superficial nature of the ritual, however, belies the deep reverence in which the law purportedly holds the oath. As an 1828 court succinctly declared:

A man of the most exalted virtue, though judges and jurors

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1. For the purposes of this Note, "witness" is defined to include any party or third person who appears at a judicial proceeding to offer testimony as to a fact at issue. In the present discussion, the special case of the infant witness has been disregarded.

2. Unless otherwise indicated, the term "oath" is used in its broad sense to refer to both religious and nonreligious attestations offered by the witness as a guarantee of the truthfulness of his testimony. The term "sworn" refers to the making of an oath by a witness.

3. See COUNCIL OF JUSTICE, BRITISH SECTION OF THE INTERNATIONAL COMM. OF JURISTS, FALSE WITNESS § 68 (1973) [hereinafter cited as JUSTICE]. This report states that the oath is "only too often regarded as a necessary formality, and rattled off with little outward sign of sincerity or understanding of its implications." *Id.*

This same complaint was registered earlier in *The Oath*, 93 JUSTICE OF THE PEACE 670 (1929) (editorial): "One feels at present that the oath is not a sanction impelling a witness to be truthful, but simply a condition precedent to prosecuting him for perjury if he lies too blatantly." For a discussion of the oath's role in modern perjury prosecutions, see text at notes 123-35 *infra*.

4. One judge has asserted that this practice is "indecorous" and inconsistent with the intended effects of the oath. See *Wilcoxon v. United States*, 231 F.2d 384, 388 (10th Cir.) (Murrah, J., dissenting), *cert. denied*, 351 U.S. 943 (1956), discussed in note 9 *infra*. In *Renfro v. Jackson County Juvenile Court*, 369 S.W.2d 616, 622 (Mo. Ct. App. 1963) (dictum), the court expressed similar disapproval of group swearing of witnesses in observing that the "dignity and solemnity of the oath should not be eroded or jeopardized by loose trial methods."

On the other hand, *Vaughn v. State*, 236 Ala. 442, 183 So. 428 (1938), and *State v. Crea*, 10 Idaho 88, 76 P. 1013 (1904), both upheld the mass swearing of witnesses. Other than bald assertions that the practice occurred frequently, neither court offered any precedent to support its holding.

might place the most entire confidence in his declarations, cannot be heard in a court of justice without oath. This is a universal rule of the common law, sanctioned by the wisdom of ages, and obligatory upon every court of justice, whose proceedings are according to the course of common law.<sup>5</sup>

Grounded in the belief that the oath represents the "highest possible security which men in general can give for the truth of their statements,"<sup>6</sup> the "sworn testimony rule" remains a maxim fundamentally unchanged since the early common law.<sup>7</sup> Illustrative of modern statements of the rule is Federal Rule of Evidence 603, which mandates that "[b]efore testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so."<sup>8</sup> Such homage to the ideal

5. *Atwood v. Welton*, 7 Conn. 66, 72 (1828).

6. R. WHITCOMBE, AN ENQUIRY INTO SOME OF THE RULES OF EVIDENCE RELATING TO THE INCOMPETENCY OF WITNESSES 39 (London 1824) (emphasis original).

7. The most recent federal decision on unsworn testimony stated that a witness who refuses to take the oath is "not a witness at all." *United States v. Fiore*, 443 F.2d 112, 115 (2d Cir. 1971), *affd. on appeal after remand*, 467 F.2d 86 (1972), *cert. denied*, 401 U.S. 984 (1973). The court noted Professor Wigmore's statement that "for all testimonial statements made in court the oath is a requisite." 443 F.2d at 115 (quoting 6 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS OF COMMON LAW § 1824 (3d ed. 1940) (emphasis original)).

The fundamental requirement of the testimonial oath "has been embedded in the principles of the common law for hundreds of years." *United States v. Moore*, 217 F.2d 428, 430-31 (7th Cir. 1954), *revd. per curiam on other grounds*, 348 U.S. 966 (1955). *Accord*, *Ex parte Cunha*, 123 Cal. App. 625, 11 P.2d 902, *rehearing denied*, 123 Cal. App. 637, 18 P.2d 979, *appeal denied*, 123 Cal. App. 637 (1932); *Curtiss v. Strong*, 4 Day 51 (Conn. 1804); *Haverly v. Clann*, 196 So. 2d 38 (Fla. Dist. Ct. App. 1967); *In re Godden*, 158 Neb. 246, 63 N.W.2d 151 (1954); *Ennen v. Southwest Potash Co.*, 65 N.M. 307, 336 P.2d 1062 (1959); *Jackson ex dem. Tuttle v. Gridley*, 18 Johns. 98 (N.Y. Sup. Ct. 1820); *State v. Ballou*, 21 Ohio App. 2d 59, 254 N.E.2d 697 (1969); *Howell v. State*, 146 Tex. Crim. 454, 176 S.W.2d 186 (1943); *Perry v. Commonwealth*, 44 Va. (3 Gratt.) 632 (1846); 1 T. STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE 80 (Boston 1826). *See generally* PHIPSON ON EVIDENCE ¶¶ 1491-510 (10th ed. M. Argyle 1963) (Great Britain).

The term "testimony" has been defined to include only statements made under oath. *See, e.g., People v. Gilbert*, 217 Cal. App. 2d 662, 666-67, 31 Cal. Rptr. 920, 923 (1963); *State v. Schifsky*, 243 Minn. 533, 539, 69 N.W.2d 89, 93 (1955).

8. FED. R. EVID. 603. Rule 603, which became effective July 1, 1975, was adopted without alteration from its initially proposed form. This circumstance suggests wide acceptance of the traditional rule. *Compare* the final version quoted in text with the preliminary draft, 46 F.R.D. 161, 287 (1969), and the official Supreme Court version, 56 F.R.D. 183, 263 (1972).

The rule against admission of unsworn testimony has been codified in many jurisdictions, including Alabama [ALA. CODE tit. 7, §§ 363-364 (1958)], Alaska [ALAS. R. CIV. P. 43(g)(5)], Arkansas [ARK. UNIFORM RULE OF EVIDENCE 603, ARK. STAT. ANN. § 28-1001 (Supp. 1976)], California [CAL. EVID. CODE § 710 (West 1966)], District of Columbia [D.C. CODE § 14-101(a) (1973)], Louisiana [LA. CODE CRV. PRO. ANN. art. 1633 (West 1961)], Ohio [OHIO REV. CODE ANN. § 2317.30 (Page 1953)], Pennsylvania [PA. STAT. ANN. tit. 28, § 251 (Purdon 1958)], Tennessee [TENN. CODE ANN. § 24-301 (1956)], and Wisconsin [Wis. STAT. § 906.03(1) (1975)].

of the oath explains why unsworn oral testimony has been admitted as evidence in open court only under the most exceptional circumstances.<sup>9</sup>

9. For example, unsworn oral testimony may be admitted when the court fails to have a witness properly sworn prior to testimony and the testimony is received without objection. See *Wilcoxon v. United States*, 231 F.2d 384 (10th Cir.), cert. denied, 351 U.S. 943 (1956). In that case, two Spanish-speaking witnesses were given an oath in English without benefit of translation. On appeal, the defendant claimed that the witnesses' inability to understand the oath had rendered their testimony invalid. The court rejected the defendant's assertion, explaining that administration of the oath may be waived where the injured party fails to make a timely objection to the omission. 231 F.2d at 387. Accord, *In re Da Roza's Estate*, 82 Cal. App. 550, 186 P.2d 725 (1947); *Mettetal v. Hall*, 288 Mich. 200, 284 N.W. 698 (1939); *People ex rel. Niebuhr v. McAdoo*, 184 N.Y. 304, 77 N.E. 260 (1906); *Trammell v. Mount*, 68 Tex. 210, 4 S.W. 377 (1887). See FED. R. EVID. 103(a) (1).

The waiver exception espoused in *Wilcoxon* has its roots in the common-law maxim of *qui tacet consentire videtur* (he who is silent is presumed to have consented). See *Cady v. Norton*, 31 Mass. (14 Pick.) 236 (1833); *Lawrence v. Houghton*, 5 Johns. 129, 131 (N.Y. 1809). The maxim is premised on the notion that otherwise incompetent evidence can be admitted if the parties so stipulate. Under this analysis, a party who fails to insist on administration of the oath has implicitly consented to the admission of the unsworn testimony and has waived any right to demand an oath.

The rationale for the rule is twofold. First, the defect could have been corrected if a timely objection had been made. Second, absent the waiver doctrine, a party might intentionally decline to object initially, preferring to raise the objection later only if he received an unfavorable verdict. See *Cady v. Norton*, 31 Mass. (14 Pick.) at 237.

The invocation of a general waiver doctrine in a situation typified by *Wilcoxon*, however, clearly conflicts with a court's interest in insuring the truthfulness of testimony through the oath requirement. If the administration of the oath is taken seriously as a judicial concept, its omission could be interpreted as plain error and, therefore, cognizable by the court sua sponte. See *Wilcoxon*, 231 F.2d at 388; FED. R. EVID. 103(d). Furthermore, omission of the oath may preclude prosecution of an unsworn witness for perjurious testimony, since administration of the oath is an essential element of perjury in all jurisdictions and proof of oath administration is necessary for conviction. See, e.g., *People v. Gilbert*, 217 Cal. App. 662, 666, 31 Cal. Rptr. 920, 923 (1963). See notes 124-27 *infra* and accompanying text.

Another exception to the sworn testimony rule had existed with respect to criminal defendants. By the end of the nineteenth century, most jurisdictions had abolished a criminal defendant's disqualification from testifying on his own behalf. See *United States v. Ives*, 504 F.2d 935, 938-39 n.6 (9th Cir. 1974); Popper, *History and Development of the Accused's Right To Testify*, 1962 WASH. U.L.Q. 454 (1962). Georgia, however, modified the traditional incompetency of the accused by enacting an 1868 statute that permitted the defendant to make an unsworn statement to the jury, though it denied him the right to testify under oath. 1868 Ga. Laws 19. The United States Supreme Court struck down this statute in *Ferguson v. Georgia*, 365 U.S. 570 (1960), holding that a criminal defendant was fully capable of appearing as his own witness. In response to *Ferguson*, the Georgia Legislature amended the invalidated statute to provide that, as an alternative to the unsworn statement, the prisoner could choose to testify under oath. 1962 Ga. Laws 133, 135; see 16 MERCER L. REV. 441 (1965). Commentators denounced the retention of the "unsworn statement option" as archaic. See, e.g., 23 MERCER L. REV. 375 (1972). Bowing to this criticism, the Georgia Legislature in 1973 deleted any reference to the unsworn statement in its statutes, thus effectively abolishing the practice. See GA. CODE ANN. § 38-415 (1974).

The purpose of this Note is relatively modest—to explore whether the traditional uncritical confidence placed in the sworn nature of testimony is justified in light of twentieth-century practice. As such, its intention is not to propose legal reforms, but rather to invite its readers to pause and reconsider a ritual too often taken for granted by the legal profession. To this end, this Note will examine the following factors influencing the character of the oath in modern times: the common-law and religious roots of the oath, the rise of nonreligious affirmation within the last century, the relationship between the oath and the law of contempts, the current *de minimis* standard for witness competency, and, finally, the relation of the sworn testimony rule to the law of perjury.

## II. SECURITY FOR THE TRUTH

### A. *The Common-Law Oath*

The requirement that witnesses be sworn has its foundation in the usually unexpressed assumption that all testimony is inherently corrupt<sup>10</sup> due to the self-interest<sup>11</sup> or indifference<sup>12</sup> of the witness. The law has never relied solely upon native honesty in its search for the truth;<sup>13</sup> rather, from the beginning it has sought through the oath to gain security against the vicissitudes of human nature.<sup>14</sup>

The common-law judicial oath was rooted in the ancient concept of “*judicium dei*”—divine judgment—shared by the early forms of proof in Anglo-Saxon law.<sup>15</sup> By this “appeal to supernatural sanctions,”<sup>16</sup> one who swore falsely could expect the swift and certain vengeance of an omnipotent god bound to intervene on the side

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A defendant's unsworn statement is still permitted by statute in Great Britain. Criminal Evidence Act, 1898, 61 & 62 Vict., c. 36, § 1(h). The statute's usefulness has also been the subject of much critical discussion. See, e.g., JUSTICE, *supra* note 3, ¶ 70.

10. It has been stated that the oath is necessary “for the purity and truth of oral evidence.” 1 S. GREENLEAF, *A TREATISE ON THE LAW OF EVIDENCE* § 328 (Boston 1842).

11. See, e.g., White, *Oaths in Judicial Proceedings and Their Effect upon the Competency of Witnesses*, 42 AM. L. REG. 373, 373-74 (1903).

12. See, e.g., R. WHITCOMBE, *supra* note 6, at 6.

13. See *Atwood v. Welton*, 7 Conn. 66 (1828), quoted in text at note 5 *supra* and discussed in note 45 *infra*.

14. See, e.g., White, *supra* note 11, at 374-86.

15. These early forms of proof included compurgation, trial by ordeal, and trial by battle. See Pollock, *English Law Before the Norman Conquest*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 88, 92-94 (1907); Thayer, *The Older Modes of Trial*, in 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 367 (1908). See generally H. LEA, *SUPERSTITION AND FORCE* (1892).

16. Pollock, *supra* note 15, at 92.

of truth.<sup>17</sup> Wigmore has noted that, as a result of this apprehension, "[i]t was not a matter of weighing the credibility of a sworn statement; the thought was rather that such an appeal could not be made with impunity."<sup>18</sup> Thus, a sworn witness who remained unharmed after testifying was presumed to have been adjudged by God to have spoken the truth.<sup>19</sup>

As the law entered a less superstitious age, the effect of the oath on the "mind and emotions"<sup>20</sup> of the witness replaced the notion of immediate divine intervention as security for the truth. To obtain this guarantee, the law expected that in taking the oath the witness would form an ironclad covenant with his god, pledging his eternal soul as security for his promise to testify truthfully.<sup>21</sup> Consequent to this doctrine was an underlying requirement that the witness believe in a supreme being who would punish him for breaching the covenant by swearing falsely.<sup>22</sup> Under this system, persons who were deemed to lack the requisite religious belief could not be sworn, and thus they could not testify.<sup>23</sup> As one court reasoned, "[i]t would indeed seem

17. See H. LEA, *supra* note 15, at 371-75; White, *supra* note 11, at 416-19.

18. 6 J. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 1816 (rev. ed. J. Chadbourn 1976).

19. *Id.*

20. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 182 (1948).

21. The purpose of the oath is not to call the attention of God to the witness, but the attention of the witness to God; not to call upon him to punish the false-swearer, but on the witness to remember that he will assuredly do so. By thus laying hold of the conscience of the witness, and appealing to his sense of accountability, the law best insures the utterance of truth. Clinton v. State, 33 Ohio St. 27, 33 (1877). Coke had declared two centuries earlier that, in its proper state, the conscience of a sworn witness should be "always gnawing and vexing him." 4 E. COKE, *INSTITUTES OF THE LAWS OF ENGLAND* 278 (London 1797).

In Perry v. Commonwealth, 44 Va. (3 Gratt.) 602, 608 (1846), the court stated that all who believe in God believe that through the oath they "incur a higher obligation" than by a simple promise or "asseveration."

22. Starkie thought that the oath was "a solemn invocation of the vengeance of the Deity upon the witness if he do [sic] not declare the whole truth, as far as he knows it." T. STARKIE, *supra* note 7, at 79-80. Coke had maintained that "[an] oath ought to be accompanied with the fear of God." 4 E. COKE, *supra* note 21, at 279. This doctrine can be distinguished from the more primitive notion of the "*judicium dei*." In both approaches a witness' fear of the Deity's wrath would undoubtedly provide strong impetus for avoiding perjury. The early oath, however, sought a physical manifestation of divine interference as a sure gauge of testimonial truth. Under the more modern theory, "[t]he administration of an oath supposes, that a moral and religious accountability is felt to a Supreme Being, and is the sanction which the law requires upon the conscience of a person, before it admits [the witness] to testify." Wakefield v. Ross, 28 F. Cas. 1347, 1347 n.2 (C.C.D.R.I. 1827) (No. 17,050). Only by such an oath was it said that "truth is enjoined, and falsehood punished." R. WHITCOMBE, *supra* note 6, at 7.

23. A corollary to this concern for the religious beliefs of the witness was the opinion that civil penalties for perjury alone were a totally inadequate sanction to ensure truthful testimony. See Central Military Tract R.R. v. Rockafellow, 17 Ill. 541,

absurd, to administer to a witness an oath, containing a solemn appeal for the truth of his testimony, to a being in whose existence he has no belief."<sup>24</sup>

Under early English law, only Christians and, by most accounts, Jews were deemed to possess the belief necessary to be sworn as witnesses.<sup>25</sup> It was not until *Omichund v. Barker*<sup>26</sup> was decided in 1744 that the class of acceptable religious followings for the purposes of the oath was expanded. In *Omichund*, an East Indian petitioned the Court of Chancery in England for relief against an English merchant with whom he had done business in Calcutta. Chancery sent a special commission to India to examine the matter firsthand,<sup>27</sup> and there the commission deposed several "Gentoos," who were sworn

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552-53 (1856); *Shaw v. Moore*, 49 N.C. (4 Jones) 25, 29 (1856) (dictum); *Commonwealth v. Winnemore*, 2 Brewst. 378, 381 (Pa. 1867) (dictum).

The traditional reliance upon the religious nature of the oath cannot be overemphasized. The need for its special influence was often expressed, most notably by President Washington in his farewell address:

Of all the dispositions and habits which lead to political prosperity, Religion and morality are indispensable supports. . . . A volume could not trace all their connections with private & public felicity.—Let it simply be asked where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths, which are the instruments of investigation in Courts of Justice?

V. PALTITS, WASHINGTON'S FAREWELL ADDRESS 151 (1935).

24. *Thurston v. Whitney*, 56 Mass. (2 Cush.) 104, 110 (1848).

25. The concept that only Christians could be properly sworn is attributable to Coke. Coke defined the oath in exclusively Christian terms, stating that it was "an affirmation or denial by any Christian . . . calling Almighty God to witnesse, that his testimony is true." 3 E. COKE, *supra* note 21, at 165. Coke made the same point in another work, where he categorically stated that, if a person were an infidel (a term he took to mean all non-Christians), he could not be a witness. 2 E. COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND § 6.b (19th ed. C. Butler 1832). This conservative stance was further fortified by Coke's well-known comment in *Calvin's Case*, 77 Eng. Rep. 377, 397 (K.B. 1609), that "[a]ll infidels are in law *perpetui inimici*, perpetual enemies . . . for between them, as with the devils, whose subjects they be, and the Christian, there is perpetual hostility, and can be no peace."

Apparently no American courts endorsed this exclusion of non-Christians, and several American tribunals expressly condemned the practice. *See, e.g.*, *Central Military Tract R.R. v. Rockafellow*, 17 Ill. 541, 552 (1856) ("a rule as narrow, bigoted and inhuman as the spirit of fanatical intolerance and persecution which disgraced his age and country"); *Shaw v. Moore*, 49 N.C. (4 Jones) 25, 27 (1856) ("narrow-minded, illiberal, bigotted, and unsound").

Despite Coke's proclamations, allowing Jewish persons to be witnesses was a customary practice of the period. 4 W. HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN c. 46, § 153 (7th ed. London 1795). *See Robeley v. Langston*, 84 Eng. Rep. 196 (K.B. 1667) (per curiam), in which the court held that Jews sworn on the Old Testament had sufficiently invoked the necessary obligations and sanctions required by the law. Both the Old and New Testaments were considered the one "word of God," and hence an oath taken on either was thought to be equally addressed to the Almighty. *See* 4 W. HAWKINS, *supra*, § 148.

26. 125 Eng. Rep. 1310 (Ch. 1744).

27. 125 Eng. Rep. at 1310-11. The order was issued in *Ramkissenseat v. Barker*, 26 Eng. Rep. 13 (Ch. 1739).

according to the ceremonies of their own religion.<sup>28</sup> The defendant objected to the subsequent introduction of these depositions in the principal case, claiming that the "infidels" could not be admitted as witnesses because their insensibility to the sanctions of the oath rendered their testimony unworthy. In his opinion for the court, Lord Chief Justice Willes declared that any person who believed in a god and in the solemn obligation of an oath was competent to testify once he had been sworn in whatever manner his conscience and religious convictions would find binding.<sup>29</sup> Rejecting Coke's "impolitic" decree that all non-Christians<sup>30</sup> were *per se* incompetent, Lord Willes stated that the capacity to be bound by an oath was not exclusive to those of the Christian faith. Although the form of oath might vary, "still the substance is the same, which is that God in all of them is called upon as a witness to the truth of what we say."<sup>31</sup> As a crucial limitation on its decision, however, the court carefully retained the notion that witnesses had to believe in some supreme being who would "punish them if they swore falsely."<sup>32</sup> The court stressed that persons who "do not think [God] will either award or punish them in this world or in the next, cannot be witnesses in any case or under any circumstances, for this plain reason, because an oath cannot possibly by [*sic*] any tie or obligation upon them."<sup>33</sup>

The broader competency of non-Christians established by *Omichund* was settled doctrine in England by the last half of the eighteenth century.<sup>34</sup> In *The King v. Taylor*,<sup>35</sup> the court interpreted *Omichund* to mean that the proper inquiry of a witness was whether he believed in God and in future rewards or punishments, not whether he believed in "Jesus Christ" or the "Holy Gospels."<sup>36</sup> And a "Mahometan" was permitted to be sworn in *The King v*

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28. The customary English oath was "read and interpreted to" each witness, who thereafter assented by touching the hand or foot of a Brahmin priest. 125 Eng. Rep. at 1317.

29. "[N]othing but the belief of a God and that he will reward and punish us according to our deserts is necessary to qualify a man to take the oath." 125 Eng. Rep. at 1313-14. Lord Willes did distinguish in such a case between a witness' competency and his credibility, thereby suggesting that a jury could give less credence to the testimony of an infidel than to that of a Christian. 125 Eng. Rep. at 1315.

30. For a discussion of Coke's views, see note 25 *supra*.

31. 125 Eng. Rep. at 1314.

32. 125 Eng. Rep. at 1315. See text at notes 20-24 *supra*.

33. 125 Eng. Rep. at 1315.

34. See 4 W. HAWKINS, *supra* note 25, § 149 n.(a).

35. 170 Eng. Rep. 62 (K.B. 1790).

36. This interpretation of *Omichund* was the source of considerable dispute. See notes 39-50 *infra* and accompanying text.



*Morgan*,<sup>37</sup> where the witness placed his right hand upon the Koran and slowly brought his forehead down to touch the book.

The policy of swearing a witness by the peculiar method most binding upon his conscience eventually led to judicial approval of rather unusual and even bizarre oaths. In this odd class, the ingenious Chinese "chicken oath" reigns supreme. To begin the ritual, a solemn declaration was written in Chinese on yellow paper, to which the witness signed his name twice. Then,

[a] cock having been procured, the Court and jury adjourned to a convenient place outside the building where the full ceremony of administering the oath was performed, as follows: By a block of wood, punk sticks, not less than three, and a pair of Chinese candles were stuck in the ground and lighted. The oath was then read out loud by the witness, after which he wrapped it in Joss-paper as used in religious ceremonies, then laid the cock on the block and chopped its head off, and then set fire to the oath from the candles and held it until it was consumed.<sup>38</sup>

American courts adopted the basic *Omichund* doctrine,<sup>39</sup> but

37. 168 Eng. Rep. 129 (Old Bailey 1765). Special oaths were also administered to witnesses of other persuasions under the *Omichund* doctrine. See, e.g., *Mee v. Reid*, 170 Eng. Rep. 69 (K.B. 1790) (Scottish witness allowed to testify even though he did not "kiss the book," a deviation from British custom); *Mildrone's Case*, 168 Eng. Rep. 308 (Old Bailey 1786) (same). See the case compilations in 12 J. ATKIN, *THE ENCYCLOPEDIA OF COURT FORMS AND PRECEDENTS IN CIVIL PROCEEDINGS* 113-20 (1948); D. BOLAND & B. SAYER, *OATHS AND AFFIRMATIONS, Forms 22-26* (1953); Lovekin, *The Whole Truth*, 3 CRIM. L.Q. 227 (1960).

38. *Rex v. Ah Wooey*, 9 B.C. 569, 570 (1902). Wigmore states that such ceremonies were not customary to Chinese persons in general. 6 J. WIGMORE, *supra* note 18, § 1818 n.3. Such illustrations are intended only to mark the unclear boundaries of the *Omichund* rule. Compare the unusual case of *Regina v. Entrehman*, 174 Eng. Rep. 493 (Central Criminal Court 1842), where a Chinese witness took his oath by kneeling in the witness box and breaking a saucer on its brass railing. He then solemnly exclaimed that, should he not speak the truth, his soul would likewise shatter. In addition to the "chicken" and "saucer" oaths, non-Christian Chinese witnesses also apparently had the option of the "candle" oath. That ceremony consisted of placing a lighted candle on the ledge of the witness box. The witness snuffed out the candle while entreating that, if he committed perjury, "May my soul be extinguished as I quench this flame." 12 J. ATKIN, *supra* note 37, at 116.

Administration of the chicken oath has been reported in only one American case. *Bow v. People*, 160 Ill. 438, 43 N.E. 593 (1896). See *State v. Chyo Chiagk*, 92 Mo. 395, 4 S.W. 704 (1887) (failure to swear Chinese witness by "joss-stick" burning held to be error); *Rex v. Lee Tuck*, 2 W.W.R. 605, 613 (Alta. 1912) (perjury conviction quashed because the Chinese Christian defendant was not sworn with the standard Christian oath).

39. "The pure principle of the common law is, that oaths are to be administered to all persons according to their own opinions, and as it most affects their consciences." *Gill v. Caldwell*, 1 Ill. 53, 53-54, 1 Breese 28 (1822). *Accord*, *Curtiss v. Strong*, 4 Day 51 (Conn. 1809); *Commonwealth v. Bachele* (Boston Mun. Ct. 1829), reported in 4 AM. JURIST & L. 79, 80-81 n.(a) (1830).

In *The Merrimac*, 17 F. Cas. 120 (C.C.S.D.N.Y. 1867) (No. 9,474), a Chinese witness was held competent to take the oath despite his inability to identify the Bible upon which he was sworn. The witness had declared that he knew the court would punish him for an untruth, and, when asked about punishment in the hereafter, he

demonstrated uncertainty about the exact nature of belief it required. The doubt arose because two reports were made of the *Omichund* opinion, each with a different version of the belief standard. The report cited above,<sup>40</sup> written by Lord Willes himself, had set the standard as belief in punishment "either . . . in this world or in the next."<sup>41</sup> Another report, published some years earlier by one Atkyns, had declared instead that the witness must fear the existence of "future rewards and punishments in the other world."<sup>42</sup> The earlier appearance of the Atkyns version compounded the confusion, as it was the explication initially relied upon by several American courts.<sup>43</sup> The court in *Atwood v. Welton*,<sup>44</sup> for example, barred one Hezekiah Scott from the witness stand because he had asserted that all dead men enjoy complete happiness.<sup>45</sup>

On the other hand, consistent with the Willes Report,<sup>46</sup> several courts during the period declared that a witness' belief or disbelief in future spiritual rewards or punishments affected only his credibil-

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had answered that if he did not tell the truth he would "go down there." Cf. T. STARKIE, *supra* note 7, at 80-81 ("all persons may be sworn as witnesses who believe in the existence of God, in the future state of rewards and punishments, and in the obligation of an oath, that is, who believe that Divine punishment will be the consequence of perjury").

40. See note 26 *supra*.

41. Willes 538, 549, 125 Eng. Rep. at 1315 (emphasis added).

42. *Omychund [sic] v. Barker*, 1 Atk. 21, 45, 26 Eng. Rep. 15, 31 (Ch. 1744) (emphasis added). The Atkyns report was published in 1765, while the Willes version was not published until 1800. Atkyns' error was the subject of extended treatment in *People v. Matteson* (Ct. of Oyer and Terminer, Otsego County 1824) (unreported opinion of Walworth, J.), reprinted in the report of *Butts v. Swartwood*, 2 Cow. 431, 432 n.(a) (N.Y. Sup. Ct. 1823).

43. See note 45 *infra*.

44. 7 Conn. 66 (1828).

45. One judge issued a blistering dissent asserting that *Omichund* excluded only atheists and other persons with no belief in divine punishment. 7 Conn. at 79 (Peters, J., dissenting). A result similar to that in *Atwood* was reached in *Wakefield v. Ross*, 28 F. Cas. 1346 (C.C.D.R.I. 1827) (No. 17,050). In *Wakefield*, the court held that the requisite testimonial accountability sought by administration of the oath was absent if the potential witness had no belief in a future state.

In *Jackson ex dem. Tuttle v. Gridley*, 18 Johns. 98, 106 (N.Y. Sup. Ct. 1820) (emphasis added), the court stated:

[N]o testimony is entitled to credit, unless delivered under the solemnity of an oath, which comes home to the conscience of the witness, and will create a tie arising from his belief that *false swearing would expose him to punishment in the life to come*. On this great principle rest all our institutions, and especially the distribution of justice between man and man.

This passage came under fire in an essay published a short time later: "A house divided against itself cannot stand; and all our institutions stand no better chance, which depend on the controverted and fluctuating *opinions* of man about what *is* or *is to happen* in another world." T. HERTTELL, *THE DEMURRER* 120 (1828) (emphasis original).

46. See note 29 *supra*.

ity, not his competency.<sup>47</sup> By the middle of the nineteenth century, the majority of courts that had addressed the question favored this less restrictive position, emphasizing that a basic belief in "God and his Providence" was sufficient for administration of the oath.<sup>48</sup> However, despite this disagreement over whether a belief in punishment and rewards after death was required under the *Omichund* doctrine, all authorities agreed that only persons who believed in *some* form of higher being could be sworn.<sup>49</sup> By definition a religious oath could not bind a nonbeliever, and one's "own notions of honor, veracity, and amenability to criminal justice"<sup>50</sup> were thought no substitute for the fear of divine wrath. Such reasoning mandated the exclusion of a witness in *United States v. Lee*,<sup>51</sup> because he had declared that "Nature" was God and that "when a man died, he died like a tree, and was resolved into his natural elements."

### B. Affirmation

The common-law ban against receiving testimony from persons whose skepticism was irreconcilable with the oath was not the only source of difficulty created by the traditional sworn testimony rule.

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47. See, e.g., *Hunscom v. Hunscom*, 15 Mass. 184 (1818). In *People v. Matteson* (Ct. of Oyer and Terminer, Otsego County 1824) (unreported manuscript of Walworth, J.) reprinted in the report of *Butts v. Swartwood*, 2 Cow. 431, 432 n.(a) (N.Y. Sup. Ct. 1823), the same conclusion was reached, and the court announced that the "strength" of the witness' convictions was a matter for the jury. This rationale was first applied in a federal court in *Rutherford v. Moore*, 21 F. Cas. 96 (C.C.D.C. 1807) (No. 12,174).

48. See, e.g., *Blocker v. Burness*, 2 Ala. 354 (1841); *Central Military Tract R.R. v. Rockafellow*, 17 Ill. 541, 552 (1856); *Smith v. Coffin*, 18 Me. 157, 160 (1841); *Free v. Buckingham*, 59 N.H. 219 (1879); *Shaw v. Moore*, 49 N.C. (4 Jones) 25, 27-31 (1856); *Brock v. Milligan*, 10 Ohio 121 (1840); *Cubbison v. M'Creary*, 2 Watts & Serg. 262 (Pa. 1841); *Jones v. Harris*, 32 S.C.L. (1 Strob.) 160 (1846); *Bennett v. State*, 31 Tenn. (1 Swan) 411 (1852). See *United States v. Kennedy*, 26 F. Cas. 761 (C.C.D. Ill. 1843) (No. 15,524) (dictum). The conclusion that a majority of courts had articulated such a position by this period may be subject to some imprecision, given the possibilities that some decisions may have remained undigested or unreported or that the courts of several states may not have had an appropriate opportunity to declare themselves on the matter. Majority status for the less restrictive rule at mid-century seems nonetheless evident from those cases discoverable by conventional research techniques. Cf. 1 T. STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE 29, n.1 (10th ed. 1876) (majority of cases cited support the less restrictive rule).

49. See, e.g., Anonymous, 1 Haz. U.S. Reg. (1839) 87 (W.D. Pa.) (now unreported opinion), noted in 1 F. Cas. 999 (Case No. 446); *Beardsley v. Foot*, 2 Root 399 (Conn. 1796); *Norton v. Ladd*, 4 N.H. 444 (1828); *Jackson ex dem. Tuttle v. Gridley*, 18 Johns. 98 (N.Y. Sup. Ct. 1820); *State v. Cooper*, 2 Tenn. 96, 2 Overt. 487 (1807); *Scott v. Hooper*, 14 Vt. 535 (1842). See 1 S. GREENLEAF, *supra* note 10, § 368; 4 W. HAWKINS, *supra* note 25, § 154.

50. *Central Military Tract R.R. v. Rockafellow*, 17 Ill. 541, 554 (1856).

51. 26 F. Cas. 908, 909 (C.C.D.C. 1834) (No. 15,586).

Members of certain Christian sects,<sup>52</sup> notably the Quakers, refused to be sworn on the ground that the common-law act of swearing was blasphemous.<sup>53</sup> In such instances the witness firmly believed in divine accountability: it was precisely the strength of that apprehension that prevented him from taking the customary oath. In order to permit persons of such religious convictions to be "sworn" within the confines of their faith, the law developed the affirmation—a formal declaration, without direct reference to divine authority, that the witness recognizes and will uphold his full obligation to tell the truth.<sup>54</sup>

In England, affirmation of witnesses was first established in 1696 by statute,<sup>55</sup> in the wake of religious toleration that followed the ascent of William and Mary to the throne. That legislation, limited to Quakers, granted the affirmation the legal force of the oath for

52. In addition to the Quakers, or Society of Friends, these sects included the Separatists and the Moravians. Each group was eventually benefited by legislation which extended the affirmation privilege. See notes 55-58 *infra*.

53. The belief stemmed in part from the Biblical admonitions in *Matt.* 5:34: "Swear not at all," and *James* 5:12: "But above all things, my brethren, swear not, neither by heaven, neither by the earth, neither by any other oath . . ." See J. BENTHAM, *SWEAR NOT AT ALL* 1, 71-75 (London 1817) (pamphlet). One contemporary writer distinguished on doctrinal grounds the three groups involved—the Quakers, the Separatists, and the Moravians—by declaring the Quakers to be the most extreme in their repugnance to swearing the customary oath. J. TYLER, *OATHS* 9-12, 239-42 (1834). Compare J. BENTHAM, *supra* at 26-27.

54. A Massachusetts statute, for example, permitted Quakers to make the following affirmation: "I, A.B., do solemnly and sincerely affirm and declare under the pains and penalties of perjury." 1743-1744 Mass. Acts ch. 20, § 1.

55. An act that the solemn affirmation and declaration of the people called Quakers, shall be accepted instead of an oath in the usual form, 1696, 7 & 8 Will. 3, c. 34. The act extended affirmation to "all courts of justice and other places where by law an oath is required within this kingdom of *England*." (emphasis original). Notably, at least one colonial assembly—New York—preceded Parliament by enacting similar legislation in 1691. See *An Act to ease People that are scrupulous in Swearing*, 1691, 3 Will. 3, reprinted in *ACTS OF ASSEMBLY PASSED IN THE PROVINCE OF NEW YORK* 10 (New York 1726) (Bradford). Pennsylvania adopted a broad affirmation statute even earlier (1682) as one of a series of laws agreed upon by William Penn and his followers in England prior to settlement of the colony. See *I Colonial Records* 40 (Act of May 5, 1682) (Pennsylvania). The Pennsylvania statute, unlike others, mandated simple affirmation for all witnesses. See *The Law about the Manner of giving Evidence, and against such as Lye in Conversation*, Act of May 31, 1693 (Pennsylvania), and a similar law passed in 1696, in *I Colonial Records* 50 (Act of November 7, 1696) (Pennsylvania).

The English parliamentary statute of 1696 established the form of the affirmation as: "I A.B. do declare in the presence of Almighty God, the witness of the truth of what I say." 7 & 8 Will. 3, c. 34, § 1 (emphasis original). This form actually violated the Quaker strictures against swearing, but was nonetheless used in court on at least one occasion. See *Rex v. Maurice*, 90 Eng. Rep. 859 (K.B. 1698). To remedy the error, Parliament in 1721 enacted a new affirmation statute with a form that made no references to God. See *An act for granting the people called Quakers, such forms of affirmation or declaration, as may remove the difficulties which many of them lie under*, 1721, 8 Geo. 1, c. 6.

"all intents and purposes."<sup>56</sup> Parliament subsequently extended the privilege to certain other denominations,<sup>57</sup> and during this period a series of colonial legislative acts preserved the affirmation privilege for American Quakers and some others.<sup>58</sup> By 1789, the practice appears to have been commonly accepted.<sup>59</sup>

56. 7 & 8 Will. 3, c. 34, § 1. However, it is significant that the statute continued to bar Quakers from giving evidence "in any criminal cause." 7 & 8 Will. 3, c. 34, § 6, retained by reference, An act for making perpetual an act of the seventh and eighth years of the reign of his late majesty King William the Third . . . , 1714, 1 Geo. 1, st. 2, c. 6, § 1, retained by virtue of the saving clause in 8 Geo 1, c. 6, § 3. See *Atcheson v. Everitt*, 98 Eng. Rep. 1142 (K.B. 1775) (discussion of pertinent legislative history).

A later act extending the affirmation to members of the Moravian sect, discussed in note 57 *infra*, contained a similar provision. The "criminal cause" restriction was removed by statute in 1828. See An Act for amending the Law of Evidence in certain Cases, 1828, 9 Geo. 4, c. 32, § 1. See also The Quakers and Moravians Act, 1833, 3 & 4 Will. 4, c. 49.

57. In 1749, Parliament extended the privilege of affirmation to witnesses of the Moravian (United Brethren) sect in order to induce their immigration to the American colonies. See An act for encouraging the people known by the name of Unitas Fratrum or United Brethren, to settle in his Majesty's colonies in America, 1749, 22 Geo. 2, c. 30, § 1. The Separatist sect was granted similar privileges somewhat later. See An Act to allow the People called Separatists to make a solemn Affirmation and Declaration instead of an Oath, 1833, 3 & 4 Will. 4, c. 82. See also An Act for improving the Administration of Criminal Justice in the East Indies 1828, 9 Geo. 4, c. 74, § 36 (permitting affirmation by Quakers, Moravians, and "natives" in India).

58. *E.g.*, An Act to ease People that are Scrupulous in Swearing, 1718, 4 Geo. 1 (N.H. Assembly), reprinted in 1702-1725 N.H. Laws 263 (Province Period, Vol. 2); An Act that the solemn Affirmation and Declaration of the People called Quakers should be accepted instead of an Oath in the usual form . . . , 1713-14, 12 & 13 Anne, c. 54 (N.J. Assembly) (Allinson), supplemented by An Act prescribing the Forms of Declaration of Fidelity, the Effect of the Abjuration Oath and Affirmation . . . , 1727-1728, 1 Geo. 2, c. 124, § 1 (N.J. Assembly) (Allinson); An Act for granting to the People called Quakers . . . the same Privileges Benefits and Indulgences . . . , 1734, 8 Geo. 2, c. 603 (N.Y. Assembly); A Supplementary Act to a Law about the Manner of giving Evidence, 1711-1712, 10 & 11 Anne, c. 7 (Pa. Assembly), reprinted in THE LAWS OF THE PROVINCE OF PENNSYLVANIA 160-61 (Phila. 1714) (Bradford); An Act prescribing the Forms of Declaration of Fidelity, Adjuration and Affirmation, 1725, 11 Geo. 1, c. 282 (Pa. Assembly); An Act for establishing the General Court, and for regulating and settling the Proceedings therein, 1705, 4 Anne, c. 19, § 31 (Va. Gen. Assembly), reprinted in A COLLECTION OF ALL THE ACTS OF ASSEMBLY NOW IN FORCE, IN THE COLONY OF VIRGINIA 155, 162 (1733).

59. See Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 83 (1789) (United States courts have the power to "impose and administer all necessary oaths or affirmations"); ch. 20, § 30, 1 Stat. 88 ("examination of witnesses in open court" governed by the common law; every person making a deposition "shall be . . . sworn or affirmed to testify the whole truth"). See also An Act to Authorize Certain Officers and other persons to Administer Oaths, ch. 36, § 1, 1 Stat. 554 (1798) (granting power "to administer oaths or affirmations to witnesses, in any case under their examination"); An Act for the Punishment of certain Crimes against the United States, ch. 9, § 18, 1 Stat. 116 (1790) (perjury on "oath or affirmation"); An Act to Regulate Collection of Duties on Imports and Tonnage, ch. 22, § 96, 1 Stat. 699 (1799) ("that whenever an oath is required by this act, persons conscientiously scrupulous shall be permitted to affirm").

The few early decisions rendered in the United States concerning affirmation of witnesses restricted its use to members of recognized religious societies, such as the Quakers, that professed conscientious scruples against taking the oath.<sup>60</sup> The confines of this rule are illustrated by a pair of federal cases involving one Daniel Kurtz. Summoned as a witness in *Bank of Columbia v. Wright*,<sup>61</sup> Kurtz—although not officially a member of the Society of Friends (Quakers)—espoused conscientious scruples against taking the oath. The *Wright* court did not permit him to affirm. Two years later, however, the same Daniel Kurtz was called to testify in *King v. Fearson*.<sup>62</sup> This time the court declared itself satisfied that Kurtz—whose application for membership in the Quaker society was then pending—met the qualifications of the stated rule, and thus allowed him to affirm.

As the nineteenth century progressed, several state legislatures extended the privilege of affirming to other persons who could not in good conscience be sworn.<sup>63</sup> In 1826, for example, Massachusetts enacted a statute providing that “any person [who] shall declare that he is conscientiously scrupulous of taking or subscribing [the] oath . . . shall be permitted to affirm in a manner provided by law for the denomination of Quakers.”<sup>64</sup> It must be emphasized that extension of the affirmation during this period did not abrogate the established belief requirement. Affirmation, rather, enabled certain persons, otherwise competent to be sworn under the common-law oath, to testify without violating their religious scruples.<sup>65</sup>

Despite the general standard of witness competency, at least one

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60. In addition to the cases discussed in the text *infra*, see *M'Intire's Case*, 16 F. Cas. 151 (C.C.D.C. 1803) (No. 8,824) (affirmation denied to a non-Quaker summoned to be sworn as a juror); *Bryan's Case*, 4 F. Cas. 506 (C.C.D.C. 1804) (No. 2,064) (affirmation denied to a Methodist juror since not shown that taking oaths was contrary to Methodist doctrines).

61. 2 F. Cas. 647 (C.C.D.C. 1827) (No. 883).

62. 14 F. Cas. 520 (C.C.D.C. 1829) (No. 7,790).

63. *E.g.*, MICH. REV. STAT., ch. 102, § 95 (1846). See also An Act for the relief of persons who are scrupulous of taking an oath in the usual form, Act of Feb. 16, 1799, § 5, in ACTS OF THE TWENTY THIRD GENERAL ASSEMBLY OF THE STATE OF NEW JERSEY 479, 480 (1799); An Act for the Relief of such Persons, as conscientiously scruple the taking of an Oath in the common Form, Act of March 21, 1772, 1771-1772 Pa. Laws 267. Cf. A Law for the relief of persons conscientiously scrupulous to take an Oath in the common form, Laws of 1795, Territory of the United States North-West of the Ohio, reprinted in THE LAWS OF THE NORTHWEST TERRITORY 1788-1800, at 163 (T. Pease ed. 1925) (affirmation permitted for Quakers only).

64. “An Act in addition to ‘an Act prescribing the mode of taking Depositions, and administering Oaths and Affirmations’” 1825 Mass. Gen. Laws, ch. 91, § 1.

65. As a result, statutes such as the Massachusetts enactment, cited in note 64 *supra*, also provided that the court could require evidence of a witness' sincerity and, if not satisfied, could require the customary oath. See also *Williamson v. Carroll*, 16 N.J.L. (1 Har.) 217 (1837) (a witness who has no conscientious objection to the taking of the oath cannot be affirmed).

mid-nineteenth century court declared that no person could be rendered incompetent because of his religious beliefs. In *Perry v. Commonwealth*,<sup>66</sup> the trial court had admitted the testimony of a witness who "did not believe that mankind would be rewarded and punished in a future state of existence," believing rather "that offences will meet their punishment here."<sup>67</sup> In affirming, the General Court of Virginia found it ironic that the persons most likely to be disabled under the common-law standard were those whose honesty forced them to admit their true convictions and thereby suffer public humiliation. The court stated that incompetency based on religious grounds would violate the state constitutional provision guaranteeing that religious distinctions cannot lessen "civil capabilities."<sup>68</sup> Courts in several other states eventually followed the lead of the *Perry* decision,<sup>69</sup> and by 1882 a Kentucky court<sup>70</sup> confidently announced that "[t]he unquestioned tendency of modern legislation, as well as of judicial interpretation, is to the exclusion of inquiry into religious belief as a test of the competency of a witness."<sup>71</sup>

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66. 44 Va. (3 Gratt.) 632 (1846).

67. 44 Va. (3 Gratt.) at 633.

68. 44 Va. (3 Gratt.) at 644.

The constitutional argument asserted by the *Perry* court had previously been held inapplicable to atheists in *Robert Perry's Admr. v. Stewart*, 2 Del. (2 Harr.) 37 (1835), where the court determined that the constitutional protection of freedom of worship did not preclude excluding the testimony of one who denied all modes of worship. The same result was reached subsequent to *Perry* in *Thurston v. Whitney*, 56 Mass. (2 Cush.) 104 (1848), quoted in text at note 24 *supra*. An 1859 Massachusetts statute removed this restriction imposed on Massachusetts atheists. Mass. Gen. Stat. ch. 131, § 12 (1859) ("every person not a believer in religion shall be required to testify truly under the pains and penalties of perjury").

69. See *Hronek v. People*, 134 Ill. 139, 24 N.E. 861 (1890) (overturning the rule of *Central Military Tract R.R. v. Rockafellow*, 17 Ill. 541 (1856)); *Colter v. State*, 37 Tex. Crim. 284, 39 S.W. 576 (1897). But see *State v. Levine*, 109 N.J.L. 503, 162 A. 909 (1932) (removal of traditional disabilities the responsibility of the legislature), declared overruled by statute in *State v. Parmigiani*, 65 N.J. 154, 157-58, 320 A.2d 161, 163 (1974).

70. *Bush v. Commonwealth*, 80 Ky. 244, *revd. on other grounds*, 107 U.S. 110 (1882). The atheist witness in this case was certified competent pursuant to a state statute that permitted all persons to affirm in lieu of oath.

71. 80 Ky. at 248 (dictum). The court construed the Kentucky Constitution as granting no legal preference to any particular belief. The court reasoned that "[t]o proscribe or punish for religious or political opinions is of the essence of despotism." 80 Ky. at 250.

In the oft-cited case of *Gantz v. State*, 18 Ga. App. 154, 88 S.E. 993 (1916), the witness had stated that he did not know where he would go when he died and that he was not a Christian. He did admit, however, that he knew he would go to the penitentiary if he lied under oath. The Georgia Court of Appeals allowed the witness to affirm, holding that "[o]ur law does not require more than that a witness shall understand the nature of the obligation of an oath and the legal consequences which should follow its violation." 18 Ga. App. at 156, 88 S.E. at 994 (emphasis added). See also *Gibson v. American Mut. Life Ins. Co.*, 37 N.Y. 580, 584 (1868) (the effect of an atheist's disbelief upon his actions is "speculative entirely").

Greenleaf, in explaining this manifest change from the common-law rule, noted that

[p]rofessional and public opinion has come to see that whatever the efficacy of the oath may be for those upon whose religious feelings it exerts an influence, the absolute exclusion from the witness stand of those who have scruples against taking it, or of those on whose belief it has no binding effect, is both unjust and impolitic. Accordingly, legislation has in most jurisdictions acted with the purpose of removing these disadvantages.<sup>72</sup>

Most states presently have statutes providing that persons unable to take the religious oath, for whatever reason, may testify under affirmation.<sup>73</sup>

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72. 1 S. GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 370-A (16th ed. 1899).

Great Britain abolished all restrictions on the testimony of atheists in 1888. The Oaths Act of 1888, 51 & 52 Vict., c. 46, §§ 1-3, provides that "[e]very person upon objecting to being sworn, and stating, as the ground of such objection, either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation instead of taking an oath." *Id.* § 1. See *Regina v. Clark*, [1962] All E.R. 428.

73. For a compilation of the various state provisions, see 6 J. WIGMORE, *supra* note 18, § 1828 n.1.

However, in three states—Maryland, Arkansas, and North Carolina—the effect of an individual's religious beliefs on his competency as a witness remains unsettled. The Maryland Declaration of Rights states that no person shall be incompetent as a witness or juror because of his religious beliefs, provided "he believes in the existence of God, and that under His dispensation such person will be held morally accountable for his acts." MD. CONST. DECLARATION OF RIGHTS art. 36. This provision's treatment of jurors in criminal cases was held unconstitutional in *Schowgurow v. State*, 240 Md. 121, 213 A.2d 475 (1965). See *Cantwell v. Connecticut*, 310 U.S. 296 (1940). Cf. *Torcaso v. Watkins*, 367 U.S. 488 (1961) (declaring unconstitutional a companion article of Maryland Constitution that made belief in God a prerequisite for public office). See also *Schiller v. Lefkowitz*, 242 Md. 461, 219 A.2d 378, *cert. denied*, 385 U.S. 947 (1966) (extending *Schowgurow* to civil cases). Although the Maryland courts have not definitively ruled on the competency of the atheist as a witness, various authorities have stated that such witnesses are capable of affirmation. See *Jackson v. Garrity*, 250 F. Supp. 1, 2 (D. Md. 1965, *supp. opinion* 1966); *White v. State*, 244 Md. 188, 192, 223 A.2d 259, 261-62 (1966) (*dictum*); 50 MD. ATTY. GEN. OP. 64, 79-80 (1965).

The Arkansas Constitution provides that "[n]o person who denies the being of a God shall . . . be competent to testify as a witness in any court." ARK. CONST. art. 19, § 1, *applied in* *Mueller v. Coffman*, 132 Ark. 45, 200 S.W. 136 (1918). However, in light of the Supreme Court's ruling in *Torcaso*, mentioned above, this language possesses doubtful vitality. Moreover, the newly enacted Arkansas Uniform Rules of Evidence apparently allow an atheist to affirm as a matter of statute. ARK. STAT. ANN. § 28-1001 (Supp. 1976).

In North Carolina, the state constitution and statutes neither prohibit testimony from atheists nor specifically enable such persons to affirm. See N.C. GEN. STAT. §§ 11-1 to -11, 12-3(5) (1969). Consequently, the restrictive common-law rule articulated in *Shaw v. Moore*, 49 N.C. 25 (1856), still technically applies there. *But see* *State v. Beal*, 199 N.C. 278, 302, 154 S.E. 604, 618 (1930) (*dictum* suggesting that exclusion of atheists is constitutionally suspect under N.C. CONST. art. I, §§ 13, 19); N.C.R. CIV. P. 43(d) (affirmation in lieu of oath). See generally Biggs, *Religious Belief as Qualification of a Witness*, 8 N.C.L. REV. 31 (1930).



The question of atheist competency remained unresolved at the federal level until 1950.<sup>74</sup> In *Gillars v. United States*,<sup>75</sup> a witness was admitted over objection despite his professed disbelief in the "God of the Bible" and in rewards or punishments after death.<sup>76</sup> The witness nonetheless recognized "the right and duty society has to furnish some means of being able to enforce members of its community to speak the truth."<sup>77</sup> The District of Columbia Circuit noted that under the early common law the witness would have clearly been incompetent, but held nonetheless that belief in God was no longer required and that the mere affirmation of an atheist was sufficient to satisfy the sworn testimony rule.<sup>78</sup> In so holding, the court relied on then-rule 26 of the Federal Rules of Criminal Procedure, which declared that the competency of witnesses was controlled "by the principles of common law as they may be interpreted by the courts of the United States in light of reason and experience."<sup>79</sup>

Prior federal statutes had anticipated the result in *Gillars*. As early as 1873, the Rules of Construction governing what is now the United States Code mandated that, wherever the terms appeared, "oath" was to be defined to include "affirmation" and "sworn" to

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Although the traditional rule regarding witness competency will probably not survive in these jurisdictions once the proper case presents itself for decision, less certainty exists about the vitality of the dubious practice, still allowed in some jurisdictions, that permits religious beliefs—or lack thereof—to be used to impeach the credibility of a witness. See 3A J. WIGMORE, *supra* note 18, § 936 & nn. 4-5; notes 29 & 47 *supra*. Evidence of the religious beliefs or opinions of a witness is not admissible in federal court for the purpose of impairing his credibility. FED. R. EVID. 610. See also *United States v. Rabb*, 394 F.2d 230, 233 (3d Cir. 1968) (suggesting use of affirmation to avoid prejudicial inquiry into the witness' membership in "unpopular" minority religion); *Virgin Islands v. Peterson*, 553 F.2d 324 (3d Cir. 1977) (evidence of particular religious belief inadmissible to *enhance* witness credibility under rule 610).

74. In 1916, a district court, applying federal common law, had held that a witness who did not believe in an avenging God was incompetent. *United States v. Miller*, 236 F. 798, 799 (W.D. Wash. 1916). This decision was effectively overruled two years later by the Ninth Circuit, which declared that federal law must yield to the provisions of article I, section 11 of the Washington state constitution, guaranteeing freedom of religion. *Louie Ding v. United States*, 247 F. 12 (9th Cir. 1918).

75. 182 F.2d 962 (D.C. Cir. 1950).

76. 182 F.2d at 969 & n.3.

77. 182 F.2d at 969 n.3.

78. 182 F.2d at 969-70. Whether *Gillars* marks the end of any religious test for competency remains to be seen, given the recent suggestion by a Pennsylvania court that a witness may be barred on the basis of religion if the tenets of his faith command him *not* to tell the truth. *Commonwealth v. Chuck*, 227 Pa. Super. Ct. 612, 616, 323 A.2d 123, 126 (1974) (dictum) (Church of Satan).

79. FED. R. CRIM. P. 26, 327 U.S. 852 (1946). Rule 26 was amended by the Act of Jan. 2, 1975, Pub. L. No. 93-595, § 3, 88 Stat. 1949, which deleted the language quoted in the text and provided that, effective July 1, 1975, the new Federal Rules of Evidence shall govern, see note 8 *supra*. See generally Orfield, *The Reform of Federal Criminal Evidence*, 32 F.R.D. 121 (1963) (historical background of rule 26).

include "affirmed."<sup>80</sup> A similar rule of construction is used in rule 43(d) of the Federal Rules of Civil Procedure, which provides that "[w]henver under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof."<sup>81</sup> Congress finally struck the death knell of atheist incompetency when it enacted rule 603 of the Federal Rules of Evidence, which permits any form of affirmation for the witness that is "calculated to awaken his conscience and impress his mind with his duty to testify [truthfully]."<sup>82</sup>

At common law, "sworn testimony" symbolized a binding contract between a witness and his God, and the religious character of this obligation provided the source of confidence invested in such testimony by the courts. As the origins of the oath reveal, the requirement that all witnesses be sworn before testifying is rooted in the apprehension of divine sanction. The common law regarded the fear of an avenging God as indispensable security against the defects inherent in human testimony and on this basis justified exclusion from the witness stand of those not susceptible to it.<sup>83</sup> However, now that belief in religious sanctions has been eliminated as a prerequisite to bearing witness in court, sworn testimony given under

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80. An Act to revise and consolidate the statutes of the United States, Dec. 1, 1873, tit. I, ch. 1, § 1, R.S. § 1 (1873). See *Braum v. United States*, 168 U.S. 532, 566 (1897). The original rules, as first enacted two years earlier, applied only to those instances where the common law or a specific statute permitted affirmation in lieu of oath. Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431. See also An Act to establish a uniform System of Bankruptcy throughout the United States, ch. 176, § 48, 14 Stat. 540 (1867) ("oath" includes "affirmation"). The current rules are codified at 1 U.S.C. § 1 (1970).

The equivalence of "oath" and "affirmation" under 1 U.S.C. § 1 was upheld in *Amtorg Trading Corp. v. United States*, 71 F.2d 524 (C.C.P.A. 1934). See *Bilderback v. United States*, 249 F.2d 271 (5th Cir. 1957), *cert. denied*, 356 U.S. 946 (1958) (indictment for perjury sufficient under 1 U.S.C. § 1 even though the crime was committed under affirmation).

81. FED. R. CIV. P. 43(d). This particular provision survived the amendment process that followed the enactment of the Federal Rules of Evidence in 1975. See note 79 *supra*. Although the "solemn" affirmation contemplated by rule 43(d) may be more limited than that authorized by the broad language of Federal Rule of Evidence 603, the distinction, if any, does not appear to be significant. See *Moore v. United States*, 348 U.S. 966 (1955) (*per curiam*) (no requirement under rule 43(d) that the specific word "solemnly" be used in the affirmation); *United States v. Looper*, 419 F.2d 1405, 1407 (4th Cir. 1969) (oath or affirmation may be given in any form that "impresses upon the mind of the witness the necessity of telling the truth"). Should any dispute arise, the wide applicability of the Federal Rules of Evidence to "civil actions and proceedings" presumably would settle the question. FED. R. EVID. 1101(b).

82. FED. R. EVID. 603. The Advisory Committee's Note emphasizes that "no special verbal formula is required." Advisory Committee's Note, 56 F.R.D. 263 (1972).

Evidence of the religious beliefs or opinions of a witness is also inadmissible in federal court for the purpose of impairing his credibility. See note 73 *supra*.

83. See text at notes 49-50 *supra*.

the affirmation is not "sworn" at all in the traditional sense.<sup>84</sup> In this way, the full emergence of affirmation has severely eroded the rationale underlying the sworn testimony rule.

*C. Refusal To Be Sworn: The Contempt  
Power and the Sworn Testimony Rule*

The use of contempt sanctions against persons who refuse to be sworn further evidences the demise of the traditional rationale for the sworn testimony rule.<sup>85</sup> Under the doctrine that every citizen owes a public duty to provide evidence when summoned,<sup>86</sup> the judiciary has long possessed the general power to compel recalcitrant witnesses to testify.<sup>87</sup> Since under the sworn testimony rule a person cannot be permitted to testify until he makes his oath or affirmation,<sup>88</sup> courts have held that refusal to be sworn as a witness is likewise in contempt of court.<sup>89</sup> Without such authority, a court obviously

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84. See White, *supra* note 11, at 424; notes 15-24 *supra* and accompanying text.

85. Although a fairly wide variety of acts can be deemed as contumacious, the essence of an action in contempt is the willful disobedience of an order of the court that obstructs its lawful proceedings. See *In re Allis*, 531 F.2d 1391, 1392 (9th Cir. 1976), *cert. denied*, 429 U.S. 900 (1977). The law of contempts has been termed "inordinately sweeping and vague," *Green v. United States*, 356 U.S. 165, 200 (1958) (Black, J., dissenting), and "a classic wilderness of single instances," Note, *Contempt of Court and the Victimization of Witnesses*, 25 MOD. L. REV. 723, 723 (1962). An oft-quoted characterization is the statement by Professor Moskowitz that "Contempt of Court is the proteus of the legal world, assuming an almost infinite diversity of forms." Moskowitz, *Contempt of Injunctions, Civil and Criminal*, 43 COLUM. L. REV. 780, 780 (1943).

86. The Supreme Court has termed this duty a "hornbook proposition." *United States v. Mandujano*, 425 U.S. 564, 572 (1976). *Accord*, *Hurtado v. United States*, 410 U.S. 578, 589 (1973); *Piemonte v. United States*, 367 U.S. 556, 558 n.2 (1961); *United States v. Brickey*, 426 F.2d 680, 688 (8th Cir. 1970).

87. See, e.g., *United States v. Wilson*, 421 U.S. 309, 315-16 (1975); *O'Connell v. United States*, 40 F.2d 201 (2d Cir. 1930); *United States v. Caton*, 25 F. Cas. 350 (C.C.D.C. 1803) (No. 14,758); *Holman v. Mayor of Austin*, 34 Tex. 668, 672 (1871).

88. See note 7 *supra* and accompanying text.

89. Evidence of this approach surfaces quite early. A classic example is *Rex v. Preston*, 91 Eng. Rep. 243 (K.B. 1690) (*nisi prius*) (Holt, C.J.). In that case, the court imprisoned one Lord Preston for refusing to be sworn "to give evidence to the grand jury on an indictment for high treason." Chief Justice Holt termed the refusal "a great contempt." 91 Eng. Rep. at 243. *Accord*, *Hennegal v. Evance*, 33 Eng. Rep. 77 (Ch. 1806) (unsworn witness ordered to submit or "stand committed"). An early instance of contempt in a federal court for refusal to be sworn is found in *United States v. Coolidge*, 25 F. Cas. 622 (C.C.D. Mass. 1815) (No. 14,858), involving a witness who refused to take the usual oath on the ground that he had a right to affirm. The court denied him that privilege and ordered him imprisoned until the witness indicated a readiness to submit. See *Ex parte Stice*, 70 Cal. 51, 11 P. 459 (1866) (witness who refused to be sworn imprisoned and fined; court held each refusal a separate contempt); *Stanbury v. Marks*, 2 Dall. 213 (Pa. 1793) (contempt for refusal to be sworn on the Sabbath). Modern courts have likewise invoked the contempt sanction against witnesses who have refused to be sworn. *E.g.*, *People v.*

could not protect its inquiry from complete frustration.<sup>90</sup>

A witness might refuse to be sworn or affirmed for several reasons. Given the rule against unsworn testimony, one obvious motive would be the desire of a witness to delay or avoid testifying. Some individuals may instead have conscientious scruples against making affirmations or promises of any sort.<sup>91</sup> Finally, refusing to be sworn may be a symbolic act of noncooperation with what the witness considers an unjust or oppressive legal system.<sup>92</sup> Without distinguishing among such individual propensities, however, most jurisdictions presently declare that refusals to be sworn are contempts as a matter of express statute.<sup>93</sup> When confronted with disobedience by the unsworn witness, the courts have been generally empowered either to punish the witness by fine or imprisonment (criminal contempt)<sup>94</sup>

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Chandler, 17 Cal. App. 3d 798, 803, 95 Cal. Rptr. 146, 150 (1971); *People v. Clark*, 4 Ill. App. 3d, 301, 280 N.E.2d 723 (1972).

One exception appears in the unusual case of *Commercial Bank of Scotland v. Lloyd's Gen. Italian Assur. Co.*, 2 T.L.R. 780 (Q.B. 1886). In that case, the plaintiff had sued upon a marine assurance policy, and had summoned the captain of the vessel involved in the dispute. The suit dragged on for several years, and when the captain was finally called he refused to be sworn "until he was paid for having been kept here in England awaiting this trial for two-and-a-half years." 2 T.L.R. at 780. The court, under the circumstances, failed to find the witness in contempt, and it never recalled him because he steadfastly refused all offers below the £ 450 figure he had set for his estimated expenses.

90. See *Commonwealth ex rel Rauthon v. Roberts*, 4 Pa. L.J. 126, 131 (D.C. Lancaster 1841) (witness who refused to be sworn "would unquestionably be guilty of misbehavior and thereby obstruct the administration of justice").

91. See *Biklen v. Board of Educ.*, 333 F. Supp. 902, 906 (N.D.N.Y. 1971), *affd.*, 406 U.S. 951 (1972) (refusal to take loyalty oath based on, *inter alia*, convictions excluding any form of affirmation as well as oath); *In re Williams*, 269 N.C. 68, 162 S.E.2d 317, *cert. denied*, 388 U.S. 918 (1967) (refusal to be sworn on the ground that to testify would violate witness' freedom of religion). See also *United States v. Huss*, 482 F.2d 38, 51 (2d Cir. 1973) (refusal to testify because Jewish law prohibited testimony by a Jew against a Jew in a non-Jewish court).

92. See *Wilson v. United States*, 369 F.2d 198 (D.C. Cir. 1966) (refusal to be sworn at an executive session of the House Committee on Un-American Activities). See also *United States v. Snider*, 502 F.2d 645 (4th Cir. 1974) (refusal to rise in a federal courtroom as a matter of personal conscience), *discussed in* 53 TEXAS L. REV. 1321 (1975).

93. *E.g.*, ALASKA STAT. § 09.50.010(10) (1976); ARIZ. REV. STAT. § 13-1823 (1956); ARK. STAT. ANN. §§ 28-512, 34-901 (1962); CAL. CIV. PROC. CODE § 1209 (9) (West 1972 & Supp. 1977), § 1991 (West 1955); CAL. PENAL CODE § 166 (West 1970); DEL. CODE tit. 11, § 1271(4) (1974); LA. CODE CIV. PRO. ANN. art. 222(5) (West 1960); LA. CODE CRIM. PRO. ANN. art. 21(4) (West 1967); MICH. COMP. LAWS § 600.1701(7)(a), .1701(7)(e) (1970); MINN. STAT. ANN. § 588.20(6) (West 1976 & Supp. 1977); MISS. CODE ANN. § 9-1-17 (1972); MO. STAT. ANN. § 476.110(5) (Vernon 1952); N.Y. JUD. LAW §§ 750(A)(5), 753(A)(5) (McKinney 1975); N.Y. PENAL LAW §§ 215.50(4), .51 (McKinney 1975); OHIO REV. CODE ANN. § 2705.02 (C) (Page 1953); VA. CODE § 8-303 (1957).

94. *E.g.*, CAL. CIV. PROC. CODE § 1218 (West 1972) (maximum \$500 fine and five days imprisonment); CAL. PENAL CODE § 166 (West 1970) (criminal proceedings only: maximum \$500 fine and six months imprisonment).

or to coerce compliance by imprisoning the offender until he will be sworn (civil contempt).<sup>95</sup> Whether the particular refusal constitutes a "criminal" or "civil" contempt depends not on the nature of the contemptuous act itself, but rather upon the specific purpose sought by the court in imposing the sanction.<sup>96</sup>

No federal contempt legislation exists that is expressly directed against the refusal to be sworn. Two statutes could be used, however, to authorize exercising the contempt power in such situations. The first, 18 U.S.C. § 401,<sup>97</sup> grants a federal court broad discretion to punish "by fine or imprisonment"<sup>98</sup> an obstruction of justice in or near the court's presence<sup>99</sup> or any disobedience to its lawful command.<sup>100</sup> On the theory that a refusal to be sworn obstructs the proceedings, this conduct would constitute a criminal contempt.<sup>101</sup> The

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95. E.g., CAL. CIV. PROC. CODE § 1219 (West 1972) (imprisonment until performance); CAL. PENAL CODE § 1331 (West 1970).

96. See *Yates v. United States*, 355 U.S. 66, 74-75 (1957), modified, 356 U.S. 363 (1958) (same act may constitute both civil and criminal contempt); *United States v. UMW*, 330 U.S. 258, 298-99 (1947) ("same acts may justify a court in resorting to coercive and to punitive measures"); *Shakman v. Democratic Organization*, 533 F.2d 344, 348-49 (7th Cir.), cert. denied sub nom. *City of Chicago v. Shakman*, 429 U.S. 858 (1976) (depends on nature of relief asked and purpose of that relief).

97. 18 U.S.C. § 401 (1970). For a discussion of the legislative history and the criminal contempt roots of the statute, see 65 MICH. L. REV. 1490 (1967).

98. 18 U.S.C. § 401 (1970). The Fourth Circuit has recently interpreted this phrase to mean that a court may punish a criminal contempt by fine or imprisonment, but not by both. *United States ex rel. Kanawha Coal Operators Assn. v. Miller*, 540 F.2d 1213, 1214 (4th Cir. 1976).

99. 18 U.S.C. § 401(1) (1970). When the act is committed in the actual presence of the court (commonly termed a "direct" contempt), the court may summarily punish the offender. See FED. R. CRIM. P. 42(a). Such punishment, imposed without prior notice or hearing and without the right to a jury trial, has been attacked by the commentators as an unconstitutional violation of due process. See Goldfarb, *The Constitution and Contempt of Court*, 61 MICH. L. REV. 283 (1962); Sedler, *The Summary Contempt Power and the Constitution: The View from Without and Within*, 51 N.Y.U.L. REV. 34 (1976); Note, *Contempt of Court: Go Directly to Jail. Do Not Pass Go. Do Not Collect Your Constitutional Rights*, 7 SUFFOLK U.L. REV. 517 (1973).

The Supreme Court has nonetheless recently upheld the propriety of summary punishment for those contempts committed in the court's presence. *United States v. Wilson*, 421 U.S. 309 (1975). That case involved two witnesses who had politely refused to testify on behalf of the government even though each had been granted immunity. Chief Justice Burger for the Court stated that summary punishment must be available to "vindicate the authority of the court as well as to provide the recalcitrant witness with some incentive to testify." 421 U.S. at 316. The Chief Justice found that obstruction of an ongoing trial was the key justification for the summary contempt power. 421 U.S. at 318. To the extent that refusal to be sworn can be characterized as an obstruction, see notes 86-90 *supra* and accompanying text, it seems clear that a witness who will not take the oath can be subjected to summary punishment under this rationale. See the discussion of *United States v. Wilson* in 13 AM. CRIM. L. REV. 271 (1975).

100. 18 U.S.C. § 401(3).

101. See notes 86-89 *supra* and accompanying text; note 99 *supra*.

second statute, 28 U.S.C. § 1826, empowers the court to confine any witness who "refuses without just cause . . . to testify or provide other information . . . until such time as the witness is willing to [comply]."<sup>102</sup> This statute appears to apply derivatively to a witness who refuses to be sworn, since that conduct may be seen as one manner of refusing to testify.<sup>103</sup>

Use of the contempt power by the courts forces *formal* compliance with the sworn testimony rule, but this sanction is clearly not consistent with the rule's objective. Through the oath, the law at least seeks to "awaken the conscience"<sup>104</sup> of the witness in order to enhance the probability that he will tell the truth. In cases in which a witness makes clear his refusal to be bound by the oath, however, compelling him to be sworn forces a fiction upon the doctrine that

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Even if § 401 were not applicable, common-law authority exists for the application of the federal contempt power. *See, e.g., United States v. Marshall*, 451 F.2d 372, 373-74 (9th Cir. 1971) (per curiam). Moreover, the District Court for the District of Columbia has held a government witness in contempt for refusal to be sworn, without any apparent reliance on statutory authority. *Coppedge v. United States*, 272 F.2d 504, 505 (D.C. Cir. 1959). *See United States v. Harding*, 237 F. Supp. 317, 317 n.3. (D. Conn. 1964) (similar result).

102. 28 U.S.C. § 1826 (1970) (maximum 18-month confinement). *See also* 28 U.S.C. § 1782 (1970) (power to compel testimony for use in foreign or international tribunal).

103. It might be argued that "refusing . . . to testify" cannot be expanded to embrace the separate act of refusing to be sworn prior to testifying. For example, a witness with conscientious scruples against being "sworn" may be perfectly willing to "testify" before the court. Further, Congress could easily have expressly provided contempt sanctions for refusal to be sworn. *See* FED. R. CIV. P. 37(b)(1) ("refus[al] to be sworn or to answer a question" constitutes contempt in discovery proceedings) (emphasis added). Numerous state legislatures have explicitly declared the refusal to be sworn to be a separate offense. *See* note 93 *supra*.

Such a literal reading of § 1826 may be attacked on several grounds. The legislative history of the statute indicates that Congress sought "to codify the civil contempt aspect of present law as it applies . . . in the area of the refusal to give required testimony," on the principle that "the public has a right to every man's evidence." 116 CONG. REC. 18921 (1970) (remarks of Sen. McClellan) (citing *Piemonte v. United States*, 367 U.S. 556, 559 n.2 (1961)). *See* S. REP. NO. 617, 91st Cong., 1st Sess. 108, 148 (1969); H.R. REP. NO. 1549, 91st Cong., 2d Sess. 46 (1970). As demonstrated earlier, the common law of civil contempts at the time of the enactment of this statute clearly encompassed the refusal to be sworn. *See* notes 89-90 *supra* and accompanying text. Moreover, on the strength of statutory language similar to that of § 1826, the Congress has customarily utilized its civil contempt powers in dealing with witnesses who have refused to be sworn before its own committees. *See* 2 U.S.C. § 192 (1970); *Eisler v. United States*, 170 F.2d 273, 280 (D.C. Cir. 1948). *See also United States v. Josephson*, 74 F. Supp. 958, 959 (S.D. N.Y.), *affd.*, 165 F.2d 82 (2d Cir. 1947), *cert. denied*, 333 U.S. 838 (1948). Finally, the force of the provision would be eviscerated by an interpretation that proscribed the refusal to testify but did not reach a prior act by which the witness might willfully render himself wholly incompetent. *See State v. Salafia*, 29 Conn. Supp. 305, 310, 284 A.2d 576, 579 (1971), where the court reasoned that the power to compel testimony implied the power to require the witness to be sworn, since testimony is commonly defined as the making of oral statements under oath.

104. FED. R. EVID. 603, discussed in note 8 *supra*.

the oath must affect the mind and emotions of the witness. On balance, the fundamental need of the courts to secure testimony will prevail over the refusal of individual witnesses to be sworn. Nonetheless, it should be recognized that testimony is obtained under this system at the expense of renouncing the security of that moral obligation upon which the oath has traditionally relied for its *raison d'être*.<sup>105</sup>

#### D. *Minimal Standard of Witness Competency*

That the courts are willing to accept testimony under a forced oath comports with the modern movement favoring admissibility of all relevant evidence. The blanket incompetencies once imposed upon atheists and other classes of potential witnesses have been almost completely eliminated in the wake of this trend.<sup>106</sup> As the Supreme Court has declared, it is "the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding . . . leaving the credit and weight of such testimony to be determined by the jury or by the court."<sup>107</sup> In the federal courts, this trend has been given effect through Federal Rule of Evidence 601,<sup>108</sup> which legislates the abandonment of such traditional incapacities as religious opinion, party interest, conviction of a crime, and mental defect.<sup>109</sup> The emerging maxim that such factors should affect only witness credibility has produced a *de minimis* standard of witness competency that has significant implications for the traditional justification for the sworn testimony rule.

A prime example of the application of this *de minimis* standard is found in *United States v. Hicks*.<sup>110</sup> In that case, the witness, the wife of the defendant, admitted that she was being supported by a

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105. Moral constraints are similarly ignored when the waiver doctrine is employed to admit inadvertently unsworn testimony. See note 9 *supra*.

106. See Weihofen, *Testimonial Competence and Credibility*, 34 GEO. WASH. L. REV. 53, 53-54 (1965).

107. *Rosen v. United States*, 245 U.S. 467, 471 (1918). In that case the Court abolished the common-law incompetency of convicts in federal court. The former rule is discussed in 2 J. WIGMORE, *supra* note 7, §§ 519-24.

108. FED. R. EVID. 601.

109. The rule was described by the Advisory Committee as a "general ground-clearing." Advisory Committee's Note to Proposed Federal Rule of Evidence 601. The committee continued with the statement that, with the exception of the so-called Dead Man's Statutes, "American jurisdictions generally have ceased to recognize these (various) grounds." *Id.* Professor Rothstein has termed this bias toward admissibility "the predominant theme" of the federal rules. *Proposed Federal Rules of Evidence, Hearings on H.R. 5463 Before the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 246 (1974) (statement of Prof. Paul F. Rothstein).

110. 389 F.2d 49 (3d Cir.), *cert. denied*, 391 U.S. 970 (1968).

man who had earlier shot her husband, that she had written the defendant "that she hated him and wanted revenge," that she was jealous of a woman with whom the defendant was "friendly," and that she used narcotics and "heard voices." Despite these admissions, the court declared itself satisfied of her competency merely because she indicated an appreciation of her obligation to tell the truth, and consequently the court allowed her to testify. In other applications of this *de minimis* standard, courts have certified the competency of narcotics addicts,<sup>111</sup> unindicted or unsentenced co-conspirators and accomplices,<sup>112</sup> paid informers,<sup>113</sup> perjurers,<sup>114</sup> and other persons of questionable integrity.<sup>115</sup> In *Poindexter v. Wolff*,<sup>116</sup> the witness was sworn even though he faced a death sentence

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111. *United States v. Van Meerbeke*, 548 F.2d 415 (2d Cir. 1976), *cert. denied*, 430 U.S. 974 (1977) (no reversible error where government witness ingested opium while testifying in opium importation prosecution). See *United States v. Killian*, 524 F.2d 1268 (5th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976) (witness competent despite "occasional hallucinations"); *Virgin Islands v. Hendricks*, 476 F.2d 776 (3d Cir. 1973); *United States v. Parker*, 428 F.2d 488 (9th Cir.), *cert. denied*, 400 U.S. 910 (1970).

112. See *United States v. Pacelli*, 521 F.2d 135, 140 (2d Cir. 1975), *cert. denied*, 424 U.S. 911 (1976) (admitted perjurer and accomplice, self-described as a "violent, vindictive, warped-minded cynic of a magnitude that you have absolutely no conception of," allowed to testify); *Lemons v. United States*, 339 F.2d 761 (9th Cir. 1964), *cert. denied*, 380 U.S. 985 (1965) (witness had pleaded guilty to related charge); *United States v. Kubacki*, 237 F. Supp. 683 (E.D. Pa. 1965) (unindicted accomplice and admitted perjurer allowed to testify). See *Washington v. Texas*, 388 U.S. 14 (1967) (co-indictee allowed to testify). Cf. *Paderick v. Boone*, 541 F.2d 447 (4th Cir. 1976), *cert. denied*, 430 U.S. 959 (1977) (new trial since fact that accomplice was granted immunity in exchange for testifying not disclosed to jury).

113. *United States v. Smith*, 343 F.2d 847, 850 (6th Cir.), *cert. denied*, 382 U.S. 824 (1965) (informer promised "benefits" for his cooperation). Cf. *United States v. Kinnard*, 465 F.2d 566, 573 (D.C. Cir. 1972) (special danger that narcotics addicts who are paid informers will lie).

114. *United States v. Mallah*, 503 F.2d 971 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975) (admitted perjurer); *United States v. Greenberg*, 419 F.2d 808 (3d Cir. 1969) (suggesting different standard for testimony of convicted perjurer).

115. In *United States v. Peller*, 151 F. Supp. 242, 248 (S.D.N.Y. 1957), a witness, who had a serious criminal record and underworld connections, was described as "utterly unreliable, unworthy of belief, and representing the almost absolute zero of credibility." Nonetheless, the court deemed the witness to be competent and permitted him take the oath as a prelude to his testimony. See *Singleton v. United States*, 381 F.2d 1, 3 (9th Cir.), *cert. denied*, 389 U.S. 1024 (1967) ("gravely unstable" and "depraved" prostitute allowed to testify); *State v. Brom*, 8 Or. App. 598, 494 P.2d 434 (1972) (witness required aid of hypnosis and sodium amytal in order to remember the events in question).

In *Stephan v. United States*, 133 F.2d 87 (6th Cir.), *stay of execution granted*, 318 U.S. 746, *cert. denied*, 318 U.S. 781, *leave to appeal denied and stay vacated*, 319 U.S. 423 (per curiam), *rehearing denied*, 319 U.S. 783 (1943), a wartime trial for treason against the United States, a German army officer "imbued with Naziism," who appeared in full-dress uniform and gave the Nazi salute, was permitted to testify as a witness.

116. 403 F. Supp. 723 (D. Neb. 1975), *affd.*, 540 F.2d 390 (8th Cir. 1976) (per curiam).



for his complicity in a bombing and had struck a plea bargain in exchange for testimony against a co-conspirator. A narcotics addict was recently sworn as a witness in *United States v. Harris*,<sup>117</sup> even though he was under the influence of drugs, did not know whether the month was "January or February," and was observed to be "bouncing or nodding" during his entire testimony.<sup>118</sup>

In such decisions, the courts have abandoned an independent concern for the probable integrity of the testimony, leaving that issue to the jury.<sup>119</sup> The modern policy of witness competency avoids the constraints of the sworn testimony rule by assuming that every person is competent to be sworn.<sup>120</sup> Although in some instances the oath may have a profound impact on the witness,<sup>121</sup> on the whole its effect will thus inevitably be as diverse as the individual characters of those being sworn. In the cases noted above,<sup>122</sup> it is difficult to imagine that the oath "awakened the consciences" of the witnesses in any meaningful fashion before they testified. That these persons were permitted to testify nonetheless stands as evidence that under present standards the "highest security" and "sanctity" of the oath are more mythical than real.

## II. THE LAST STAND OF THE SWORN TESTIMONY RULE: THE OATH AND THE CRIME OF PERJURY

As an adjunct to divine punishment, for centuries the common law has insisted that witnesses incur legal penalties for their untruths.<sup>123</sup> Both sanctions were invoked by the same oath, and absent the oath the witness was liable under neither.<sup>124</sup> The force of the

117. 542 F.2d 1283 (7th Cir. 1976).

118. 542 F.2d at 1303.

119. *E.g.*, *United States v. Barnard*, 490 F.2d 907, 912-13 (9th Cir. 1973), *cert. denied*, 416 U.S. 959 (1974). This shift has necessitated cautionary instructions to the jury where the unreliability of the witness is especially acute. *See Paderick v. Boone*, 541 F.2d 447 (4th Cir. 1976), *cert. denied*, 430 U.S. 959 (1977), discussed in note 112 *supra*; *United States v. Kinnard*, 465 F.2d 566, 572 (D.C. Cir. 1972) (failure to caution reversible error), discussed in note 113 *supra*.

120. Compare the assumptions underlying the common-law doctrine, notes 10-24 *supra* and accompanying text.

121. *See* text at notes 136-38 *infra*.

122. *See* notes 110-18 *supra* and accompanying text.

123. In the earliest period of the common law, the doctrine of *judicium dei*, *see* text at notes 15-18 *supra*, made mere civil penalties insignificant and unnecessary. Apparently this attitude changed as the possibility of divine intervention became less certain in legal minds. A superb history of the law of perjury is given in *Recommendations and Report to the Legislature on Perjury*, in LAW REVISION COMMISSION, STATE OF NEW YORK, REPORT OF THE LAW REVISION COMMISSION 227, 235-54 (1935) [hereinafter cited as LAW REVISION COMMISSION]. *See also* 4 W. BLACKSTONE, COMMENTARIES \*137-38; Comment, *Perjury: The Forgotten Offense*, 65 J. CRIM. L. & CRIMINOLOGY 361, 361-63 (1974).

124. *See, e.g.*, *United States v. Bailey*, 34 U.S. (9 Pet.) 238 (1835); *Rex v. Ay-*

religious sanction in modern society is in doubt, but, in all jurisdictions, statutes clearly indicate that the crime of perjury<sup>125</sup> remains dependent on the oath or affirmation.<sup>126</sup> One example of the rule that the oath is generally a condition precedent to perjury is the federal statute providing that "[w]hoever, having taken an oath before a competent tribunal . . . that he will testify, declare, depose, or certify truly, . . . willfully and contrary to such oath states . . . any material matter which he does not believe to be true, is guilty of perjury."<sup>127</sup>

Whether the oath should be an essential element of the crime is questionable. The act of lying, regardless of whether the witness is sworn, could itself be punished. This reform has been adopted in legislation governing certain instances where administration of an oath would prove inconvenient or financially burdensome.<sup>128</sup> Most significantly, the federal perjury statute<sup>129</sup> was recently amended<sup>130</sup> to permit the use in court of certain unsworn declarations.

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lett, 99 Eng. Rep. 973, 976 (K.B. 1785). The civil penalties for perjury alone were considered insufficient security for a person's truthfulness. See note 23 *supra*.

125. For the purposes of this Note, "perjury" is defined narrowly as the deliberate giving of false oral testimony in court by a contending party or his witness. See JUSTICE, *supra* note 3, ¶ 1.

126. *E.g.*, ALA. CODE tit. 14, §§ 375-377 (1959); ALASKA STAT. § 11.30.010 (1970); CAL. PENAL CODE § 118 (West 1970); ILL. ANN. STAT. ch. 38, § 32-2 (Smith-Hurd 1973); MASS. ANN. LAWS ch. 268, § 1 (Michie/Law. Co-op 1968); VA. CODE § 18.2-434 (1975); The Perjury Act, 1911, 1 & 2 Geo. 5, c. 6, § 1 (1911). The Model Penal Code provides: "A person is guilty of perjury . . . if in any official proceeding he makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when . . . he does not believe it to be true." MODEL PENAL CODE § 241.1(1) (Prop. Official Draft 1962).

127. 18 U.S.C. § 1621 (1970). These requirements have changed little from the original 1790 federal statute, see An Act for the Punishment of certain Crimes against the United States, ch. 9, § 18, 1 Stat. 116 (1790), and are strikingly similar to past expressions of the common-law rule, see 3 E. COKE, *supra* note 21, at 164.

In applying this provision, the courts have clearly indicated that the administration of the oath or affirmation is a prerequisite to a conviction for perjury. See *United States v. Hvass*, 355 U.S. 570, 574-75 (1958); *United States v. Debrow*, 346 U.S. 374 (1953) (dictum) (oath an essential element of the crime); *United States v. Howard*, 132 F. 325 (W.D. Tenn. 1904) (indictment must aver that witness was sworn).

128. See, e.g., 18 U.S.C. § 1001 (1970), which makes it a criminal offense to give "any false, fictitious or fraudulent statements or representations" in any matter within the jurisdiction of a department or agency of the United States; I.R.C. § 7206(1), which imposes a maximum punishment of three years imprisonment and a \$5,000 fine for any false statement verified by an unsworn written declaration that it is made under the penalty for perjury. The specific application of 18 U.S.C. § 1001 to false statements made to federal law enforcement officials has been critically discussed in Note, *Criminal Liability for False Statements to Federal Law Enforcement Officials*, 63 VA. L. REV. 451 (1977). See also MODEL PENAL CODE § 241.3 (Prop. Official Draft 1962) (criminal sanctions for unsworn written statement made "with [the] purpose to mislead a public servant in performing his official function").

129. 18 U.S.C. § 1621 (1970), quoted in text at note 127 *supra*.

130. Act of Oct. 18, 1976, Pub. L. No. 94-550, §§ 1-2, 90 Stat. 2534. This Act

Moreover, whether the threat of criminal punishment invoked by the oath actually deters perjury is open to question. Theoretically, the formality of the oath places a witness on notice of his potential criminal liability. Accepting this premise, a plurality of the Supreme Court in *United States v. Mandujano*<sup>131</sup> recently stated that "[o]nce a witness swears to give truthful answers, *there is no requirement to 'warn him not to commit perjury or, conversely to direct him to tell the truth.'*"<sup>132</sup> Yet perjury is an extremely common offense that is ineffectively reached by any sanction and is rarely prosecuted.<sup>133</sup> Moreover, it has been suggested that, "as general standards of honesty and respect for the authority and effectiveness of the law decline, the incidence of perjury is likely to increase."<sup>134</sup>

Perhaps the high incidence of perjury is due to the unsalvageably corrupt nature of man. It is more likely, however, that the prospect of supernatural punishment or criminal prosecution is outweighed by more personal concerns: fear of public embarrassment at disclosure of the truth, threats against one's person or property, financial self-interest, loyalty to one of the parties, the opportunity for personal revenge against an adversary, or the need to conceal other crimes. In any case, the oath may have no significant independent effect upon the truthfulness of individual witnesses. Given these circumstances, it is not surprising that Chief Justice Burger concluded in *Mandujano* that, in the absence of criminal penalties for perjury, "even the solemnity of the oath . . . cannot insure truthful answers."<sup>135</sup>

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added a new section (§ 1746) to title 28 of the United States Code that generally authorizes "the use of unsworn statements subscribed to under penalty of perjury." See H.R. REP. NO. 1616, 94th Cong., 2d Sess. 2 (1976), reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5644, 5645. Section 2 of the Act amended 18 U.S.C. § 1621 to provide that any person who "in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, wilfully subscribes as true any material matter which he does not believe to be true; is guilty of perjury." 18 U.S.C. § 1621(2) (Supp. 1977).

The purpose of new § 1746 is to expedite the verification of certain documents after business hours and the procurement of declarations from outside the United States. H.R. REP. NO. 1616, *supra*, at 1. Depositions or any statements required to be signed before a specified official other than a notary public are not eligible for § 1746 treatment. See H.R. REP. NO. 161, *supra* at 2.

131. 425 U.S. 564 (1976).

132. 425 U.S. at 581-82 (opinion of Burger, C.J.) (emphasis original) (quoting *United States v. Winter*, 348 F.2d 204, 210 (2d Cir. 1965)). Of course, it is not improper for the court to caution a suspect witness about the penalties for perjury. See *United States v. Vosper*, 493 F.2d 433, 436 (5th Cir. 1974).

133. See JUSTICE, *supra* note 3, ¶ 2; LAW REVISION COMMISSION, *supra* note 123, at 235; Purrington, *The Frequency of Perjury*, 8 COLUM. L. REV. 67, 70 (1908) ("pains and penalties so rarely inflicted as to have become the 'rumble of a distant drum'"); Comment, *supra* note 123, at 361 (citing REPORT OF THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 374 (1968)).

134. JUSTICE, *supra* note 3, ¶ 2.

135. 425 U.S. at 576.

## III. CONCLUSION

The oath remains an icon in the law: a symbol to the witness of duty demanded. Yet the devout society that gave birth to and nurtured the firm religious foundation of the sworn testimony rule no longer exists, and, with that passing, members of the legal profession must take stock of the legacy bequeathed to present generations.

Several commentators have advanced that notion that, despite the erosion of its fundamental religious force, the oath continues to be an important institution. Wigmore maintained that many witnesses may still be influenced by the oath's religious connotations.<sup>136</sup> Others have suggested that "mental anguish"<sup>137</sup> induced by the oath may be an incentive for truthful testimony, and that the ritual offers the witness an opportunity to gain a sense of respectability and self-satisfaction by conforming to the social expectation that only the truth should be spoken in a court of law.<sup>138</sup> Our examination of the affirmation and the relationships between the oath and the law of contempts and of perjury, however, contends for the proposition that the ancient institution of the oath has been reduced to a mere technicality of the perjury statutes. It is certain that, in an age of almost universal competency and broad admissibility of evidence, the sworn testimony rule no longer embodies the "*highest possible security* which men in general can give for the truth of their statements."<sup>139</sup>

The state of the sworn testimony rule does not necessarily counsel for its complete abandonment. The solemn swearing of a particular witness may imperceptibly benefit the law in its search for the truth, and the practice remains curiously engrained in the legal psyche. Yet the oath is largely an historical artifact: to borrow Justice Holmes' oft-quoted phrase, to a significant extent "the grounds upon which [the traditional rule] was laid down have vanished long since, and the rule simply persists from blind imitation of the past."<sup>140</sup> This being the case, the deep and uncritical confidence placed in the sworn nature of testimony cannot longer be justified.

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136. 6 J. WIGMORE, *supra* note 18, § 1827.

137. *See* United States v. Looper, 419 F.2d 1405, 1407 n.2 (1969).

138. Sorenson, *The Effectiveness of the Oath To Obtain a Witness' True Personal Opinion*, 47 J. CRIM. L.C. & P.S. 284, 286 (1956).

139. R. WHITCOMBE, *supra* note 6, at 39 (emphasis original).

140. O.W. HOLMES, *COLLECTED LEGAL PAPERS* 187 (1920).